UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ANTONE PERRY	
v.	C.A. No. 02-23-T
UNITED STATES OF AMERICA	

MEMORANDUM AND ORDER

Ernest C. Torres, Chief United States District Judge.

Antone Perry has filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. For reasons stated below, that motion is denied.

Background

On January 28, 2000 Perry pled guilty to two counts of distributing heroin in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C), and one count of possessing a firearm after having been convicted of a felony in violation of 18 U.S.C. § 922(g)(1). Later, Perry received a sentence of 151 months imprisonment on each of the drug offenses and 120 months on the firearms offense, all sentences to run concurrently. The drug offense sentence was within the range of 151 - 188 months set forth under the United States Sentencing Guidelines ("Guidelines"), which range reflected a career offender enhancement under USSG § 4B1.1, because Perry previously had been convicted of larceny from a person, a crime of violence, as well as a controlled substance offense.

Before Perry pled, his counsel had filed a motion to suppress evidence that a loaded firearm had been seized during a search of Perry's apartment. Instead of pursuing that motion, Perry's counsel negotiated a plea agreement under which the Government would: (1) make a nonbinding recommendation of the lowest term of imprisonment under the operable Guidelines sentencing range; (2) recommend a three-level decrease in sentencing level for acceptance of responsibility; and (3) refrain from filing a sentencing enhancement information under 21 U.S.C. § 851.

At the sentencing hearing Perry's counsel challenged the career offender enhancement on the ground that larceny is not a crime of violence. However, this Court determined that larceny from a person is a crime of violence. See United States v. DeJesus, 984 F.2d 21, 24-25 (1st Cir.1993).

Perry's conviction was summarily affirmed by the Court of Appeals. See United States v. Anton Perry, Dkt. No. 00-1614 (August 22, 2000), cert den. 531 U.S. 1096, 121 S.Ct. 824 (2001).

The claims made by Perry in his petition may be grouped into three categories: (1) claims of ineffective assistance of counsel in connection with his guilty plea; (2) due process violations; and (3) Apprendi claims.

The Applicable Standards

General

The pertinent section of § 2255 provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence is in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255, ¶ 1.

A prisoner seeking relief under § 2255 is procedurally barred from raising issues not presented on direct appeal unless he demonstrates "'cause' and 'prejudice;'" or, alternatively, that he is "'actually innocent.'" Brache v. United States, 165 F.3d 99, 102 (1st Cir 1999)(quoting Murray v. Carrier, 477 U.S. 478, 485, 496 (1986)). However, ordinarily, those showings are not required with respect to ineffective assistance of counsel claims. Knight v. United States, 37 F.3d 769, 774 (1st Cir.1994).

Generally, the grounds justifying relief under 28 U.S.C. § 2255 are limited. A court may grant such relief only if it finds a lack of jurisdiction, constitutional error or a fundamental error of law. United States v. Addonizio, 442 U.S. 178, 184-185, 99 S.Ct.2235 (1979). "[A]n error of law does not provide a basis for collateral attack unless the

claimed error constituted a fundamental defect which inherently results in a complete miscarriage of justice." Id. at 184-185 (internal quotations omitted). Here, none of the claims raised by Perry entitles him to relief.

A prisoner who invokes §2255 is not entitled to an evidentiary hearing as a matter of right. See United States v. McGill, 11 F.3d 223, 225 (1st Cir.1993). Because the files and records of this case conclusively establish that the allegations of in the petition are without merit (as set forth infra), no hearing is required in connection with any issues raised by the Petition. See United States v. Carbone, 880 F.2d 1500, 1502 (1st Cir. 1989)("A hearing is not necessary where a §2255 motion (1) is inadequate on its face, or (2) although facially adequate, is conclusively refuted as to the alleged facts by the files and records of the case.")(internal quotations omitted).

Ineffective Assistance of Counsel

A defendant who claims that he was deprived of his Sixth Amendment right to effective assistance of counsel must demonstrate:

(1) That his counsel's performance "fell below an objective standard of reasonableness"; and

(2) "[A] reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984).

See Cofske v. United States, 290 F.3d 437, 441 (1st Cir. 2002).

The defendant bears the burden of identifying the specific acts or omissions constituting the allegedly deficient performance. Conclusory allegations or factual assertions that are fanciful, unsupported or contradicted by the record will not suffice. Dure v. United States, 127 F.Supp.2d 276, 279 (D.R.I. 2001) (citing Lema v. United States, 987 F.2d 48, 51-52 (1st Cir. 1993)); see also Barrett v. United States, 965 F.2d 1184, 1186 (1st Cir. 1992) (summary dismissal of § 2255 motion is proper where, *inter alia*, grounds for relief are based on bald assertions).

In assessing the adequacy of counsel's performance:

> [T]he Court looks to "prevailing professional norms." A flawless performance is not required. All that is required is a level of performance that falls within generally accepted boundaries of competence and provides reasonable assistance under the circumstances.

Ramirez v. United States, 17 F. Supp. 2d 63, 66 (D.R.I. 1998) (quoting Scarpa v. Dubois, 38 F.3d 1, 8 (1st Cir. 1994) and citing Strickland, 466 U.S. at 688).

The standard applied in making that assessment is a highly deferential one. Thus,

> [The] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'

Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

Counsel's judgment need not be right so long as it is reasonable. United States v. McGill, 11 F.3d 223, 227 (1st Cir. 1993). Furthermore, reasonableness must be determined "[without] the distorting effects of hindsight." Strickland, 466 U.S. at 689.

Analysis

I. The Ineffective Assistance Claims

A. The Guilty Plea

1. Failure to Address Career Offender Enhancement

Perry claims that his counsel told him that his Guideline range would be 77 - 91 months but failed to inform him that his sentence could be enhanced pursuant to the Guidelines' career offender provisions. He asserts that if he had been fully informed, he would not have pled guilty.

Perry's claim is flatly contradicted by the record. At the plea colloquy Perry was specifically told that the Government was seeking a career offender enhancement. See Transcript of Plea Hearing ("Plea Tr.") conducted on January 28, 2000 at 6, 22-23. In addition, he was advised that the Court would determine the sentence and that he had no guarantee that his sentence would fall within the range

estimated by his counsel. (Id. at 15-16.)

Finally, Perry was informed that he could receive up to 20 years imprisonment on each of the two drug charges and up to 10 additional years on the firearms charge. (Id. at 17.)

Even if Perry had not been told these things, an erroneous estimate of his guideline range by counsel would not provide a basis for vacating his sentence. See United States v. De Alba Pagan, 33 F.3d 125, 127 n.3 (1st Cir. 1994)(noting that "even the furnishing of an *incorrect* estimate to [Perry] by his own counsel would not afford a basis for permitting him to withdraw his earlier plea."). (Citations omitted.)(Emphasis in original.)

2. Failure to Negotiate Conditional Plea

Perry further argues that his counsel was ineffective in failing to pursue the motion to suppress and failing to negotiate a conditional plea agreement that would have allowed Perry to challenge any denial of that motion. There are several flaws in that argument. First, Perry has failed to show that the motion to suppress would have been granted. The record shows Perry previously had sold heroin to undercover agents and told them that he kept a loaded firearm at his apartment. The record also shows that the firearm was seized during a search of Perry's apartment. The search was

conducted pursuant to a warrant, and Perry has provided no facts that would have justified suppressing the fruits of this search.

Second, counsel made a perfectly reasonable tactical decision to abandon the motion to suppress in order to obtain the benefits contained in the plea agreement, including the Government's recommendation that Perry be given (1) the lowest term of imprisonment available under the Guidelines sentencing range and (2) a three-level decrease in sentencing level for acceptance of responsibility, as well as the Government's agreement to refrain from filing a separate information seeking a sentencing enhancement based on his prior drug convictions. These benefits were conditioned on Perry's pleading guilty.

Third, there is absolutely no basis for concluding that, if the motion to suppress had been denied, the Government would have agreed to a conditional plea or that the Court would have accepted it. On the contrary, the Court rarely accepts conditional plea agreements.

Finally, Perry was not prejudiced because, even if the motion to suppress had been granted and the firearms charge had been dismissed, Perry's sentence would have remained the same. Perry's guideline range was based on the fact that he

was a career offender. The firearms offense played no role in establishing the offense level for his drug offenses. Since Perry received the minimum sentence within the guideline range for his drug offenses – and since the sentence for his firearms offense ran concurrently with that sentence – the result would not have been any different even if the firearms charge had been dismissed.

II. Due Process Claims

Perry claims that his due process rights were violated because the Court failed to establish that he understood the consequences of his plea agreement. That claim is patently frivolous.

Perry has waived any such claim by failing to raise it on appeal. The validity of a plea cannot be challenged for the first time in a §2255 motion unless the movant demonstrates "cause" and " prejudice." See, e.g., Cody v. United States, 249 F.3d 47, 51-51 (1st Cir. 2001)("Without a showing of cause (and prejudice), 'the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review.'"), quoting Bousley v. United States, 523 U.S. 614, 621, 118 S.Ct. 1604 (1998).

Even if this claim was not waived, it is totally devoid of merit. The record shows that Perry was fully informed

regarding the consequences of his plea and that he assured the Court, under oath, that he understood those consequences, including the maximum sentence that would be imposed. (See Plea Tr. at 15-17.)

III. Apprendi Claims

A. Constitutionality of 21 U.S.C. § 841

Perry claims that 21 U.S.C. § 841 is facially unconstitutional in light of the Supreme Court's intervening decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000).[1]

Under § 841 the maximum penalty that may be imposed varies according to the quantity of drugs at issue, but the lowest maximum sentence for offenses involving heroin is 20 years.[2]

In Apprendi the Supreme Court held that the Constitution requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the

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[1] Because Perry's case was still pending on direct review at the time of the Apprendi decision, the Government's argument that Apprendi does not apply to cases on collateral review is inapposite here.

[2] The maximum penalty for possession of heroin with intent to distribute – if a first offense not involving death or serious injury – is life imprisonment where the amount is at least one kilogram, 21 U.S.C §841(b)(1)(A); 40 years for amounts from 100 grams up to one kilogram, §841(b)(1)(B); and 20 years for amounts less than 100 grams, §841(b)(1)(C).

prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. However, the First Circuit has made it clear that "no constitutional error occurs when the district court sentences the defendant within the statutory maximum, regardless that drug quantity was never determined by the jury beyond a reasonable doubt." United States v. Baltas, 236 F.3d 27, 41 (1st Cir. 2001). See also United States v. Collazo-Aponte, 281 F.3d 320, 324-325 (1st Cir. 2002)(same; and finding "no constitutional defect" in language or design of §841).

Here, in his plea agreement and during the plea colloquy, Perry admitted to possessing 2.9 grams of heroin with intent to distribute it. (Plea Tr. at 22-24.) Section 841(b)(1)(C) makes possession with intent to distribute that quantity of heroin, or any quantity less than 100 grams, punishable by up to 20 years imprisonment. Since Perry's sentence was well below that maximum, Apprendi is not applicable.

B. Constitutionality of Sentencing Guidelines.

Perry claims that Apprendi also renders unconstitutional the Guidelines provision that increases the penalty for drug offense based on the quantity of drugs involved. That claim is without merit for the same reasons that § 841(b) is not

unconstitutional. See United States v. Caba, 241 F.3d 98, 101 (1st Cir. 2001) ("Apprendi simply does not apply to guideline findings ... that increase the defendant's sentence, but do not elevate the sentence to a point beyond the lowest applicable statutory maximum.")

C. Drug Type and Quantity As Elements of Offense Charged.

Perry claims that his plea was not knowing because the quantity of heroin was an element of the offense and the indictment failed to provide him with notice of the quantity with which he was charged.

This argument fails for at least two reasons. First, as the First Circuit has observed, "Apprendi did not convert all sentencing factors into elements of the offense, [but rather] only those that increase ... the penalty of a crime beyond the prescribed statutory maximum." Collazo-Aponte, 281 F.3d at 326 n.3 (internal quotations omitted). Second, as already noted, the proffer made by the Government during Perry's plea colloquy specified the quantity of heroin and Perry admitted that the proffer was accurate. (Plea Tr. at 2-4, 20-23.)

D. Applicability of § 841(b)(3).

Perry claims that under Apprendi the default statutory maximum sentence for his drug offenses is limited to one year,

pursuant to 21 U.S.C. §841(b)(3). He argues that because under §841(b) the maximum penalty that may be imposed varies according to the drug type and quantity at issue, drug type and quantity are sentencing factors and not elements of the offense.

The short answer to this claim is that § 841(b)(3) deals with offenses involving schedule V controlled substances; it does not deal with Schedule I or II controlled substances. The offense to which Perry pleaded guilty involved heroin, a Schedule I controlled substance, the penalty for which is prescribed in §841(b)(1)(C). Compare 18 U.S.C. § 841(b)(1)(C) (providing maximum penalty of 20 years for even trace amounts of heroin or other schedule I or II substances) with § 841(b)(3)(providing maximum penalty of one year for offenses involving Schedule V substances).

In addition, because the 151-month sentence imposed for Perry's drug offenses is far less than the 20-year maximum sentence possible under §841(b)(1)(C), Apprendi does not apply. See Collazo-Aponte, 281 F.3d at 324; United States v. Robinson, 241 F.3d 115, 121-122 (1st Cir. 2001)(Apprendi rule not applicable where actual sentence is less than default statutory maximum sentence for substance in question).

Perry's other claims are without merit and do not warrant discussion.

CONCLUSION

For all of the foregoing reasons, Perry's petition is denied and dismissed.

IT IS SO ORDERED.

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Ernest C. Torres
Chief Judge

Dated: